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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 735

C. C. ROMINE, as Administrator of the Estate of GEORGE A. ROMINE, Deceased,
Petitioner,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of Arizona and Brief in Support Thereof

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SUBJECT INDEX

	Page
Petition for Writ of Certiorari	1
Opinion of the Appellate Court	2
Jurisdiction of the Supreme Court of the United States	2
Summary Statement of Matter Involved	3
Questions Presented	9
Reasons Relied on for the Allowance of the Writ	10
Certificate of Counsel	12
Brief in Support of Petition	13
Argument	13
Conclusion	25
Appendix	

TABLE OF AUTHORITIES CITED

Cases	Pages
Abie State Bank v. Weaver, 282 U.S. 765, 51 S.Ct. 252, 75 L.Ed. 690	15
Davis v. Department of Labor, 317 U.S. 249, 63 S.Ct., 225, 87 L.Ed. 246	17
Desper v. Starved Rock Ferry Co., 342 U.S. 187, 72 S.Ct. 216, 96 L.Ed. 205	11, 24
Hyde v. U.S., 225 U.S. 347, 391	21
Montgomery v. Terminal R. Assoc., 73 S.W. 236 (Mo. Sup.) cert. den. 233 U.S. 602, 53 S.Ct. 118	23
New York Central Railroad Company v. Winfield, 244 U.S. 147, 37 S.Ct. 546, 61 L.Ed. 1045 Ann. Cases 1917D, 1139	8, 13, 14, 15, 16, 18, 19, 20, 21
New York Central R. Co. v. White, 249 U.S. 188, 37 S.Ct. 247, 61 L.Ed. 667	17
Shanks v. Del. & Lack. & West. R. Co., 239 U.S. 556, 558, 36 S.Ct. 188, 189, 60 L.Ed. 436 L.R.A. 1916c 797	22
Southern Pacific Co. v. Industrial Comm., 113 P.2d 763 (Cal. App.)	22
Terminal Railroad Assoc. v. Brotherhood of Railroad Trainmen, 318 U.S. 1, 63 S.Ct. 420, 87 L.Ed. 571	16
Tigner v. State of Texas, 60 S.Ct. 879, 310 U.S. 141, 84 L.Ed. 1124 rehearing denied, 60 S.Ct. 1092, 310 U.S. 659, 84 L.Ed. 1422	15
Urie v. Thompson, 69 S.Ct. 1018, 337 U.S. 163, 93 L.Ed. 1282	15
West Coast Hotel Company v. Parrish, 57 S.Ct. 578, 300 U.S. 379, 81 L.Ed. 703, 108 A.L.R. 1330	15

STATUTES

Pages

Federal Employers Liability Act of the United States (Title 45, Sections 1-60, United States Code Annotated)....4, 5, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25

Liability Act of the State of Arizona (Arizona Code Annotated 1939, Sections 56-801 to 56-807) 2, 3, 4, 9, 10, 11, 17, 18, 23, 24, 25

U. S. Constitution, Fifth Amendment.....10, 11,18

U.S.C.A., Title 28, Section 1257..... 2

TEXTS

Roberts Federal Liability of Carriers, 2nd Edition, Vol. 2, page 1529..... 13

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Petition for Writ of Certiorari to the Supreme Court of the State of Arizona

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner named in the caption above, being the appellee in the court below, respectfully prays for a writ of certiorari to the Supreme Court of the State of Arizona to review the decision and judgment of that court rendered on the *22nd* day of *December,* 1952, which reversed outright the judgment and decision of the Superior Court of Pima County, Arizona for petitioner, being appellee below, against the Southern Pacific Company, a corporation, being appellant below, which case was numbered 34550 in the

Superior Court of Pima County, Arizona, and was an action for the injury and death of George A. Romine, an employee of the Southern Pacific Company, under the Liability Act of the State of Arizona as contained in Sections 56-801 to 56-807 inclusive of the Arizona Code Annotated 1939. Said writ is also to review the order of the Supreme Court of the State of Arizona entered the 26th day of January, 1953, denying this petitioner's motion for a rehearing, which case was numbered 5569 in the Supreme Court of the State of Arizona.

OPINION OF THE APPELLATE COURT

The opinion of the Supreme Court of the State of Arizona is reported in 251 P.2d 908.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

This Court has jurisdiction to review the judgment and decision of the State Supreme Court under Title 28 U.S.C.A., Section 1257.

The decision of the Supreme Court of the State of Arizona involves the construction, effect and application of a Federal Act, contrary to the meaning and purpose of that Act, in violation of petitioner's rights under the Fifth Amendment of the Constitution of the United States, and contrary to applicable and controlling decisions of this Court. An order was made by the Supreme Court of the State of Arizona staying the issuance of its mandate to and including April 25, 1953, conditioned upon the filing of this petition in this Court within the time last mentioned, and that said stay shall continue in effect until this petition is passed upon.

SUMMARY STATEMENT OF MATTER INVOLVED

The deceased George A. Romine was a brother of petitioner. Petitioner is the duly appointed, qualified and acting administrator of his deceased brother's estate. The decedent was unmarried, and left no dependents. Petitioner filed an action against the Southern Pacific Company and John R. Curry in the Superior Court of Pima County, Arizona, in Tucson, in two counts.

The first count was against the appellant company alone under the State Employers Liability Act as contained in Sections 56-801 to 56-807 Arizona Code Annotated 1939, in which petitioner alleged George A. Romine was injured and killed by an accident arising out of and in the course of his employment with the appellant company while engaged in the hazardous occupation of railroading as defined by that Act, due to the condition or conditions of such occupation or employment, which said injury and death was not caused by the negligence of George A. Romine, and which accident occurred while decedent was riding on a motor car of the appellant company on its tracks while it was loaded with lumber being transported to another location on said tracks for the purpose of building an addition to a pump house then under construction over a pump used for supplying domestic water to section hands of appellant company living nearby, when a piece of such lumber slipped forward and downward on said motor car, and was thrown back, causing the reverse end of one piece to pierce the body of decedent killing him almost instantly. Negligence under the State statute is not an element of the right to recover.

The second count was against the appellant company and John R. Curry, the foreman of the decedent George A.

Romine, and a resident of the State of Arizona, alleging such foreman and the appellant company negligently operated a motor car on the tracks of the appellant company and as a direct and proximate result of such negligence George A. Romine was injured and killed.

The appellant company, by answer to the first count, admitted the aforesaid employment, injury and death, but denied such injury and death were caused by a condition or conditions of such occupation and employment and were not caused by the negligence of George A. Romine. The appellant company further alleged that at the time of such injury and death both the decedent and itself were engaged in interstate commerce and that part of decedent's duties were in furtherance of interstate commerce, and that decedent was within the coverage of the Federal Employers Liability Act of the United States (Section 51, Title 45, United States Code Annotated), and that decedent upon his death did not leave any surviving widow, children, parent or next of kin dependent upon him. A general denial was made to the charge of negligence in the answer filed by both defendants to the second count.

The jury returned a verdict in the amount of $20,000.00 for petitioner against the appellant company on the first count, and against the petitioner on the second count. Judgment was duly entered in accordance with the verdict by the trial court, and the appellant appealed to the Supreme Court of the State of Arizona, which reversed said judgment outright.

Under the Arizona Liability Act (Sections 56-801 to 56-807 A.C.A., 1939) any employer in hazardous occupations, specifically including railroads, shall be liable for death or

injury of an employee caused by accident due to a condition or conditions of such occupation in all cases where injury or death was not caused by the negligence of the employee so killed or injured. It is not a negligence statute, so far as the employer is concerned, but rather a special compensation act applicable only to hazardous occupations as therein defined. Under it recovery may be had for the injury and death of an employee without dependents by the personal representative for the benefit of the estate of the deceasd employee.

The Federal Employers Liability Act (Title 45, Sections 1 to 60 U.S.C.A.) differs from the State act in two respects material to this case. In the first place, it is wholly a negligence act and the employer is not liable, except for injuries caused by the negligence of the employer, its agents, servants or employees, which was not the case in this action, according to the verdict of the jury in the trial court. In the second place, it is wholly a dependency act and no recovery may be had under it for the injury and death of an employee who has no dependents as in this case. Prior to the trial the appellant company filed a motion for a summary judgment which, after hearing, was denied by the trial court.

The evidence showed that George A. Romine, petitioner's decedent, was injured and killed July 24, 1950, as set out in the complaint. Other members of the gang included the foreman Curry and the witnesses Hesselbaum and Walker. All during the month of July, 1950, prior to the accident, this gang had been engaged in the construction of a pump shed over a pump near Saddle, Arizona. The pump was used for supplying domestic water to the appellant company's maintenance-of-way employees. An older shed near Hyder, Ari-

zona, was wrecked and the material transported, in part at least, by motor car to Saddle. It was on one of these trips with the motor car loaded with such material that petitioner's decedent was injured and killed.

For several months prior to the time this particular project was undertaken, petitioner's decedent had been engaged as a carpenter in general building maintenance upon and along the Southern Pacific line, including the maintenance and repair of the railroad bridges on the section of the appellant company's transcontinental tracks running through Hyder and Saddle, Arizona, west to California, and east to New Mexico. Over that line appellant company's transcontinental freight and passenger trains pass frequently. The witnesses Walker and Hesselbaum testified that, as they moved along in the motor car over these tracks, it was the duty of George A. Romine to make a rolling inspection of the right-of-way and of passing trains thereon. However, the foreman Curry testified that on the day of the fatal trip he instructed the men to watch the material on the motor car and took upon himself the duty of watching the right-of-way. A special notice was signed by the Division Superintendent July 5, 1950, directing all employees to watch and patrol tracks for flood damage but there is no evidence this was brought to the attention of George A. Romine or any member of his gang, except the foreman Curry. Under the evidence there is nothing specific in the rule book of the appellant company that says carpenters should watch passing trains.

The carpenters acted under the instructions of their foremen, and there is no evidence Romine's foreman Curry ever gave him any instructions with reference to making a rolling

inspection. The witnesses Hesselbaum and Walker and other members of the gang testified it was their duty to make such rolling inspections, but they could never recall ever having reported anything as the result of such rolling inspection except during the latter part of 1949 or the early part of 1950 they discovered a loose pipe in the cargo of a gondola car which was reported to the Agent at Willcox.

The collective bargaining contract of the appellant company obligating it to furnish domestic water to members of its maintenance-of-way crews was offered in evidence, but there is no evidence to show that the shed petitioner's decedent was engaged in constructing at the time of his injury and death was necessary to the proper functioning and operation of that pump.

At the close of the plaintiff's evidence, the appellant company offered a motion for a directed verdict which was over-ruled. Such a motion was again offered at the close of all the evidence in the case, and again over-ruled. At the close of plaintiff's case, the appellant company asked and was granted leave to amend its Answer setting up a plea of contributory negligence and assumption of risk to diminish damages. At the request of the appellant company, the trial court instructed the jury in accordance with this amendment with reference to the first cause of action. Thereafter the appellant company made a motion for judgment, notwithstanding the verdict, and for a new trial and on denial of these motions filed an appeal to the Supreme Court of the State of Arizona.

In the Supreme Court of the State of Arizona, the appellant company made two assignments of error. One that the trial court erred in denying the appellant company's mo-

tions for a directed verdict at the close of the plaintiff's case and at the close of all of the evidence, because the evidence showed conclusively that a part of petitioner's decedent's duties were in the furtherance of interstate commerce or in a way directly or closely and substantially affected such commerce, and because the decedent left no dependents no right of action existed under the Federal Act. Assignment two was based upon the trial court's over-ruling its motion for judgment notwithstanding verdict for the same reasons.

The Supreme Court of the State of Arizona took the position that the Federal Employers Liability Act covers the entire field of employers responsibility for injury or death of an interstate carrier's employee, following the doctrine enunciated in the majority opinion in the case of *New York Central Railroad Company v. Winfield*, 244 U.S. 147, 37 S.Ct. 546, 61 L.Ed. 1045 Ann. Cases 1917D, 1139, and held that the Federal Employers Liability Act is exclusive even in non-negligence and in non-dependency cases. Said Court considered the employee's general duties in interstate commerce several months immediately preceding the fatal accident in determining the question of whether or not the employee was engaged in interstate commerce or in activities affecting or furthering interstate commerce and it held that the 1939 amendment to the Federal Employers Liability Act was applicable to the case at bar, notwithstanding that it is admitted on both sides that there are no benefits which can be paid to petitioner under the Federal Employers Liability Act.

It also held that the testimony that petitioner's decedent was under a continuing duty to make a rolling inspection of the right-of-way and of passing trains thereon, together with the appellant company's collective bargaining contract,

under which it was obligated to furnish domestic water to its maintenance-of-way employees stationed near Saddle, Arizona, and his general duties in interstate commerce months before his injury and death brought this case within the scope of the Federal Employers Liability Act, as amended, to the exclusion of petitioner's rights under the State Employers Liability Act, because such facts were sufficient to bring not only the appellant company, but petitioner's decedent within the field of interstate commerce as defined by the Federal Employer's Liability Act, as amended, and in effect holds that the trial court should have sustained the appellant company's motions for a directed verdict as a matter of law. It reversed and remanded the trial court's judgment with directions to dismiss plaintiff's complaint.

QUESTIONS PRESENTED

The issues presented are whether the Supreme Court of the State of Arizona correctly interpreted the Employers Liability Act of the State of Arizona and the Federal Employers Liability Act in holding that Congress had absorbed the field so as to supersede the State Act and preclude recovery under the State Act in a non-dependency and non-negligence case, not covered by the Federal Act, and whether or not the Federal Employers Liability Act as amended and as construed and applied by the Supreme Court of the State of Arizona to the peculiar fact situation of this non-negligence and non-dependency case to the exclusion of petitioner's rights under the State Act, not included in the Federal Act, constitute a deprivation of due process of law in violation of petitioner's rights under the

Fifth Amendment of the Constitution of the United States; and whether the Supreme Court of the State of Arizona correctly applied the 1939 amendment of the Federal Employers Liability Act to this case, in which there are admittedly no benefits under the Federal Employers Liability Act.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

Petitioner takes the position that the Supreme Court of the State of Arizona has decided important questions relating to the construction and application of the Federal Employers Liability Act, as amended (Title 45, Sections 1 to 60 U.S.C.A.) contrary to the intention of Congress and completely beyond the scope of that Act and contrary to controlling decisions of this Court, so as to exclude petitioner's rights under the State Employers Act of Arizona, which rights are not covered by the Federal Act, in violation of petitioner's rights under the Constitution of the United States in this to-wit:

I.

The Federal Employers Liability Act being purely a negligence and dependency act does not preclude petitioner's rights and benefits under the State Employers Liability Act in this non-negligence and non-dependency case.

II.

The construction, interpretation and application of the Federal Employers' Liability Act by the Supreme Court of the State of Arizona that it does preclude petitioner from obtaining the benefits of the State Act in such a case, gives that Act an effect constituting a deprivation of due process

of law in violation of petitioner's rights under the Fifth Amendment of the Constitution of the United States.

III.

The 1939 Amendment to the Federal Employers' Liability Act under its own wording and under the controlling decision of this Court does not affect the rights or remedies of railroad employees under State acts, but merely defines the scope of the word "employee" to include persons not theretofore covered who are engaged in interstate commerce as therein defined *and entitled to the benefits of the Federal Act.* In this case where there are no benefits provided in the Federal Act, the 1939 amendment has no application, and the interpretation and construction of the 1939 amendment by the Supreme Court of the State of Arizona so as to preclude petitioner's rights under the State Act is prejudicial to petitioner, outside the scope and purpose of the 1939 amendment and contrary to the controlling decision of this Court in the case of *Desper v. Starved Rock Ferry Co.*, 342 U.S. 187, 72 S.Ct. 216, 96 L.Ed. 205.

WHEREFORE petitioner respectfully prays for a writ of certiorari to be issued to the Supreme Court of the State of Arizona commanding that Court to certify and send to this Court, for its review and determination, the full and complete transcript of the record and all proceedings entitled as in the caption of this petition and catalogued in the Supreme Court of the State of Arizona as Number 5569, and that the decision and judgment of the Supreme Court of the State of Arizona be reversed by this honorable Court, and the judgment of the trial court reinstated, and for such

other and further relief in the premises as to this Court may seem just.

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CERTIFICATE OF COUNSEL

I, the undersigned counsel for petitioner herein, do hereby certify that the foregoing petition for writ of certiorari in my opinion is well founded and meritorious and is not interposed or filed for the purpose of delay.

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Brief in Support of Petition for Writ of Certiorari

See Reasons for Allowing Writ in Petition:

ARGUMENT

I. & II.

The Federal Employers Liability Act is exclusive of State legislation only in the matters with which it deals (Roberts Federal Liability of Carriers, 2nd Edition, Vol. 2, page 1529). More than thirty-five years ago, and when state compensation acts were in their infancy and struggling for judicial acceptance, this Court, in a split decision, held, in the cases of *New York Central R. Co. v. Winfield*, 244 U.S.

147, 37 S.Ct. 1917D, 1139, 546, 61 L.Ed. 1045 Ann. Cases state compensation acts authorizing recovery for non-negligent claims were superseded by the Federal Employers' Liability Act, even though it is purely a negligence act, under which there is no liability unless the carrier was negligent and the employee was injured thereby. At that time the restrictive nature of the Federal Act was pointed out in a dissenting opinion by Justice Brandeis, concurred in by Justice Clarke, which concludes as follows at page 449 of L.R.A. 1918c:

> "The contention that Congress has, by legislating on one branch of the subject relative to Interstate Commerce, preempted the whole field, has been often made in this Court; and the cases cited below will show has been repeatedly rejected in cases where the will of Congress to leave the balance of the field open to State action was far less clear than the circumstances here considered. Tested by those decisions and by the rules which this Court has framed for its guidance, I am of the opinion, as was said in Atlantic Coast Line R. Co. vs. Georgia 234 U.S. 280, 294, 58 L. Ed. 1312, 1319, 34 S. Ct. 829 that, 'the intent to supersede the exercise of the State police power with respect to this subject cannot be inferred from the restricted action which has thus far been taken'. *The field covered by Congress was a limited field of the carrier's liability for negligence, not the whole field of the carrier's obligation arising from accidents.* I find no justification for imputing to Congress the will to deny a large class of persons engaged in a necessarily hazardous occupation, *and otherwise unprovided for,* the protection afforded by beneficent statutes enacted in the long deferred performance of an insistent duty *and in a field peculiarly appropriate for State action.*" (Emphasis ours.)

Petitioners respectfully urge that this Court re-examine the Winfield case, including the dissenting opinion. Petitioners respectfully assert that an erroneous application of the Federal Employers Liability Act began then and has been carried on to and including the decision of the Arizona Supreme Court in this case. This case is a striking example of challenges presented by dissenting Justices persisting and remaining unanswered. Under such circumstances this Court has said it will re-examine the former decision (*West Coast Hotel Company v. Parrish,* 57 S.Ct. 578, 300 U.S. 379, 81 L.Ed. 703, 108 A.L.R. 1330).

A former decision of this Court does not preclude a review in the light of later actual experience (*Abie State Bank v. Weaver,* 282 U.S. 765, 51 S.Ct. 252, 75 L.Ed. 690), nor is a former opinion any bar to the power of this Court to probe issues disposed of in prior cases (*Urie v. Thompson,* 69 S.Ct. 1018, 337 U.S. 163, 93 L.Ed. 1282). Where time and circumstances have drained the prior case of much of its vitality, this Court will determine the same issue in its present-day setting (*Tigner v. State of Texas,* 60 S.Ct. 879, 310 U.S. 141, 84 L.Ed. 1124 rehearing denied, 60 S.Ct. 1092, 310 U.S. 659, 84 L.Ed. 1422).

We can add little to the vigorous reasoning of the challenges presented by Justices Brandeis and Clarke in the *Winfield case,* supra, other than to urge that the peculiar facts of this case bring those challenges sharply into focus and that certiorari should be granted in the interest of justice to the parties and to give this Court an opportunity to re-examine the out-moded doctrine of the *Winfield case* to the effect that by the entry of Congress into a field with only a negligence statute, State acts providing compen-

sation for injured employees in non-negligence cases are superseded. Non-negligence claims are an entirely different type of claim, and fill a need not provided for in the old negligence actions, as is shown by the continued public demand for, and the acceptance by the courts of, compensation acts during the thirty-five years that have elapsed since this doctrine was enunciated by the majority opinion in the *Winfield case.* Not only is the case at bar a non-negligence case, but it is even outside the scope of the majority opinion in the *Winfield case,* because no recovery could have been had in this case under the Federal Employers Liability Act even if negligence had been proved *because the decedent left no dependents.* That fact is conceded on both sides.

Is there any reason why Congress should have intended to provide redress for the estate of one railroad employee under the Federal Employers Liability Act and deny redress for another's under an adequate State act where both were killed in the same accident and under exactly the same conditions, simply because the first employee had dependents and the latter had none. If such were the intention of Congress, it would have said so explicitly and given the reason therefor. The true rule, we submit, is as stated as follows in appellee's brief (l.c. 574 of 87 L.Ed.) and followed by this Court in *Terminal Railroad Assoc. v. Brotherhood of Railroad Trainmen,* 318 U.S. 1, 63 S.Ct. 420, 87 L.Ed. 571:

> "State action, if within the police power, is valid unless Congress has *affirmatively* excluded its exercise by acting directly and immediately upon the subject matter in question, *so that State action is repugnant to Federal action.* Such power is not excluded merely because Congress has regulated a part of the field. Missouri P. R. Co. v. Norwood, 283 U.S. 249, 75 L.Ed.

1010, 51 S.Ct. 458, 30 N.C.A. 639; Kelly v. Washington, 302 U.S. 1, 82 L.Ed. 3, 58 S.Ct. 87; Northwestern Bell Telph. Co. v. Nebraska State R. Commission, 297 U.S. 471, 80 L.Ed. 810, 56 S.Ct. 536; H. P. Welch Co. v. New Hampshire, 306 U.S. 79, 83 L.Ed. 500, 59 S.Ct. 438."

We urge that it is not repugnant to the Federal action to permit the minimum requirements of a State Act to stand in cases where the Federal Act does not even purport to cover as broad a field as the State Act in two such vital aspects as non-negligence and non-dependency claims, for which no provision whatever is made or even suggested in the Federal Act.

The holding of the Supreme Court of the State of Arizona in this case is adverse to the recent decision of this Court in the case of *Davis v. Department of Labor,* 317 U.S. 249, 63 S.Ct., 225, 87 L.Ed. 246 to the effect that there is a presumption that all employees are covered by the compensation provided in the State acts in the absence of convincing reasons rebutting such coverage. The decision of the Ariz. Sup. Ct. is erroneous in the face of the undisputed evidence that the decedent for weeks before his injury and death had been engaged in the construction of an intrastate shed, which was then inchoate and had not been completed to the point where it was ready to be used even indirectly in Interstate Commerce, or in a manner so as to further or affect Interstate Commerce to even an unsubstantial degree, (*New York Central R. Co. v. White,* 249 U.S. 188, 37 S.Ct. 247, 61 L.Ed. 667) and further in face of the fact that the very title of the Federal Employers Liability Act itself states it shall only apply in "certain cases" which do not include non-negligence and non-dependency cases.

We submit the majority opinion in the *Winfield case* amounts to an amendment of a legislative act by judicial decision in denial of petitioner's rights under the State act. While we have no case in point, we urge that under the particular fact situation of this case there is presented to this Court, perhaps for the first time, a clear cut example of how the majority opinion in the *Winfield case* amounts to a deprivation of due process of law, in violation of petitioner's rights under the Fifth Amendment to the Constitution of the United States, and further presents an instance where, we submit, this Court can and should grant certiorari to reexamine that thirty-five year old decision in the present-day setting of this case in which State compensation acts for non-negligence claims have, by experience in the interim, found public and judicial acceptance and approval.

It may well be that in 1908 the concept of the "field" of employer responsibility did not, in the opinion of the majority of the Court, extend very far, if at all, beyond the traditional standard of liability of employer to employee for negligence. Those in the practice, who are old enough to recall, remember the cry that "liability without fault" was pure Socialism. It was only because of the efforts of such forward thinking men as Judge Brandeis that the proposal that industry should bear the burden of employment injuries took hold.

Even if Congress, in the enactment of the Federal Employers' Liability Law, had in mind the few compensation and liability statutes then in the States and intended that the Act should preclude their operation, it must be conceded that the Congress of that period had not come to that acceptance of compensation and liability laws which has been

recognized in the past decade. We are dealing with the situation as it exists today, and the power of the States is not to be tested by conceptions prevailing nearly a half century ago.

If this statute were new on our books, it isn't likely that it would be seriously contended that Congress had occupied the entire "field." Not only are compensation and liability states, such as the one we have here, to be found throughout the United States, but the concept has expanded and now includes occupational disability. That too is to be denied to the States if the *Winfield decision* is still to be followed on the theory that the "field" of employer responsibility has been fully occupied. Suppose a railroad employee, with a wife and a half-dozen or more children, should be killed in the course of his interstate employment—unless he were able to prove negligence under the Federal Employers' Liability Act, his widow and children, under the doctrine of the *Winfield case,* would have no remedy under either the State or the Federal act.

There is need for a re-examination of this question in the light of present-day views. The power of the States to provide that railroads shall make financial provision for injuries or death to their employees while in interstate commerce and thus shift that burden from the state taxpayers to the place where it belongs, ought not to be shackled by the conception of a Federal statute which has become wholly unrealistic under modern conditions.

The 1939 Amendment, herewith set out in Point III, has enormously enlarged the class of employees entitled to the "benefits" of the Federal Employers' Liability Act. We believe it fair to estimate that scores of thousands formerly

entitled to the benefits of State non-negligent acts now find themselves unprotected against the hazard of industrial injury, unless they, or their estates or dependents, are able to establish carrier negligence—that is of course if the rule of the majority in the *Winfield case* is to continue to control. This very case gives point to the discussion.

It is no answer, we submit, to say that Congress must be presumed to have intended to legislate in the light of the *Winfield case* and to except the additional beneficiaries from the relief theretofore afforded them by State acts in non-negligent cases. This would indeed be using a principle of statutory construction with a vengeance. In no period in our history has the Congress sought more energetically (whether always wisely) to improve the lot of the workingman. Certainly Congress intended to enlarge the class of those who could seek the relief of the Federal Employers' Liability Act, and more clearly identify the members of the entire class, but there is nothing in its action to justify the view that it intended, by indirection and inference, that the doctrine of the *Winfield case* should be applied either to the old limited class or the new expanded class.

Let the *Winfield rule* be applied and the 1939 Act is an affliction to the employees and a boon to the railroads. Was that the Congressional intention?

Congress has not spoken directly. It is only by inference that the sovereignty of the States has been limited. Inferences depend upon conditions which change with the times. An inference, justified under one state of facts and in one era, may meet repudiation in a different decade, under changed conditions.

The phrase "the entire field has been occupied by the Federal Employers' Liability Act" has become encysted in the law without serious recent analysis, and calls to mind Justice Holmes' frequently quoted statement in *Hyde v. U.S.*, 225 U.S. 347, 391 "It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter, for a long time, cease to provoke further analysis."

The Supreme Court of the State of Arizona may have been bound by the *Winfield* majority opinion as to this non-negligence case, but this Court is not, and petitioner respectfully maintains the time has now come for a re-examination of the majority opinion in the *Winfield case,* to meet the challenges so forcefully and clearly made against it by the dissenting Justices at the very time it was written, and in the light of the favorable experience that has been had by both employer and employee, under State compensation acts in the thirty-five years since that opinion was written.

III.

The 1939 Amendment to the Federal Employers' Liability Act has no application in a case where there are no benefits provided under the Federal Act. This amendment is in one sentence and we quote it here, with italics, to show its limited application and purpose, as follows:

> "Any employee of a carrier, any part of whose duties as such employee shall be in the furtherance of interstate or foreign commerce; or shall, in any way, directly or closely and substantially affect such commerce, as above set forth, shall, for the purposes of this Act, be considered as being employed by such carrier in such commerce *and shall be considered as entitled to the benefits of this chapter.*"

In this case it is admitted there are no benefits provided under the Federal Employers' Liability Act. Had the 1939 amendment read that the employee be engaged in "such commerce" *or* entitled to the benefits of the Federal Act, then it might be applied without any benefits provided in the Federal Act, but the amendment being in the conjunctive it can only apply, by its own words, where two essential elements are present:

(1) When the employee was engaged in "such commerce," *and* (not "or")

(2) When the employee is entitled to the benefits provided in the Federal Act.

Since only one of these two essential elements is present in this case, the 1939 amendment can have no application.

Except for the 1939 amendment, to come within the scope of the Federal Employers' Liability Act, the employee at the time of his injury or death must have been engaged in actual interstate transportation or work so closely related to interstate transportation as to be practically a part of it. It is not sufficient that any part of an employee's duties furthered or affected interstate commerce. (*Shanks v. Del. & Lack. & West. R. Co.*, 239 U.S. 556, 558, 36 S.Ct. 188, 189, 60 L.Ed. 436 L.R.A. 1916c 797.) Indeed, the appellant company, in another case, admitted that one of its own employees, injured while repairing a boom car used to remove obstacles and obstructions on its interstate railroad tracks, would have been covered by the State compensation act and would not have been within the scope of the Federal Employers' Liability Act, except for the 1939 amendment. (*Southern Pacific Co. v. Industrial Comm.*, 113 P.2d 763 (Cal.App.))

Therefore, even if decedent was under a duty to make the rolling inspection of the tracks and passing trains thereon, except for the 1939 amendment, the Federal Act, as a matter of law, could have had no application to the facts of this case, and the decision of the Supreme Court of the State of Arizona in applying the 1939 amendment to case where it is admitted there are no benefits under the Federal Act, despite the conjunctive wording of the 1939 amendment requiring benefits as well as that the employee be engaged in "such commerce," is highly prejudicial to petitioner. In this connection, we urge that this Court examine the case of *Montgomery v. Terminal R. Assoc.*, 73 S.W. 236 (Mo. Sup.) cert. den. 233 U.S. 602, 53 S.Ct. 118 holding, under an almost identical fact situation, that the duty of a railroad carpenter to make a rolling inspection of the right-of-way and passing trains thereon, while traveling in a motor car to an intrastate construction project was not sufficient, as a matter of law, to bring such employee within the scope of the Federal Employers' Liability Act before the 1939 amendment. A long list of authorities on the point are collected in that case and we know of no authority to the contrary.

We do not believe even the appellant company will contend the Federal Act has any application under the facts of this case, except for the 1939 amendment. We submit the 1939 amendment does not apply under its conjunctive wording unless (1) the employee was engaged in "such commerce," *and* (2) entitled to benefits under the Federal Act. Therefore the Supreme Court of the State of Arizona has erroneously applied the 1939 amendment to this non-benefit case under the Federal Act, to the exclusion of petitioner's

rights under the State Act. We submit this erroneous application of the 1939 amendment, to a case which Congress never intended it should be applied under the conjunctive wording of the amendment, should be reason enough for this Court to grant certiorari.

Moreover, the decision of the Supreme Court of the State of Arizona, in applying such inapplicable 1939 amendment to a case where there are no benefits under the Federal Act, so as to preclude petitioner's rights under the State Act, is not only contrary to the conjunctive wording of the 1939 amendment, but is also contrary to the recent decision of this Court in *Desper v. Starved Rock Ferry Company,* 342 U.S. 187, 72 S.Ct. 216, 96 L.Ed. 205, in which this Court said at l.c. 209 of 96 L.Ed.:

> "We agree with the Court below that the amendment *has no effect on the right or remedy of railway employees* but merely defines for the purposes of the Federal Employers' Liability Act, *the scope of the word 'employee'* to include certain persons, not heretofore covered, because they were not directly engaged in interstate or foreign commerce."

The Supreme Court of the State of Arizona has applied the 1939 amendment so as to affect and preclude petitioner's right and remedy under the State Act, while at the same time holding there are no benefits to which petitioner is entitled under the Federal Act, contrary, we submit, to the controlling decision of this Court in *Desper v. Starved Rock Ferry Co.*, supra, holding the 1939 amendment has no effect upon the rights and remedies of railroad employees, but only defines employees entitled to the benefits of the Federal Act, who were not theretofore covered.

CONCLUSION

Petitioner therefore submits that this Court should grant certiorari in this case for the following reasons:

(1) The Federal Employers' Liability Act, being purely a negligence and a dependency Act, does not preclude petitioner's rights and benefits in this non-negligence and non-dependency case under the State Act.

(2) The construction, interpretation and application of the Federal Employers' Liability Act by the Supreme Court of the State of Arizona that it does preclude petitioner from obtaining the benefits of the State Act, in such a case, constitutes a deprivation of the due process of law, in violation of petitioner's rights under the Fifth Amendment of the Constitution of the United States.

(3) The 1939 amendment to the Federal Employers' Liability Act has no application, under its own wording and under the prior controlling decision of this Court, to a case where there are no benefits provided in the Federal Act.

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(Appendix follows)

APPENDIX

Sections 56-801, 56-803(1) and Section 56-804 Arizona Code Annotated, 1939, reads as follows:

"56-801. Liability defined. To protect the safety of employees in all hazardous occupations in mining, smelting, manufacturing, railroad, or street railway transportation, or any other industry, as provided in section 7 of article 18 of the state constitution, any employer, whether individual, association, or corporation, shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employee in the vice of such employer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured."

"56-803. Hazardous occupations enumerated. The occupations hereby declared and determined to be hazardous within the meaning of this article are as follows:

1. The operation of steam railroads, electrical railroads, street railroads, by locomotives, engines, trains, motors or cars of any kind propelled by steam, electricity, cable or other mechanical power, including the construction, use or repair of machinery, plants, tracks, switches, bridges, roadbeds, upon, over and by which such railway business is operated."

"56-804. Right of action—Limitation. When in the course of work in any of the employments or occupations enumerated in the preceding section, personal injury or death by any accident arising out of and in the course of such labor, service and employment, and due to a condition or conditions of such occupation or employment, is caused to or suffered by any workman engaged therein, in all cases in which such injury or

death of such employee shall not have been caused by the negligence of the employee killed or injured, then the employer of such employee shall be liable in damages to the employee injured, or, in case death ensues, to the personal representative of the deceased for the benefit of the surviving widow or husband and children of such employee; and, if none, then to such employee's parents; and, if none, then to the next of kin dependent upon such employee, and, if none, then to his personal representative, for the benefit of the estate of the deceased. The action for such damages shall not be maintained unless commenced within two (2) years from the day the cause of action accrued."

Sections 51 and 59 of Title 45 U.S.C.A. read as follows:

"51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees. Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories* and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin *dependent* upon such employee, for such injury or death resulting in whole or in part *from the negligence* of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence,

*or between the District of Columbia or any of the States or Territories

in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, Sec. 1, 35 Stat. 65; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404."

"59. Survival of right of action of person injured. Any right of action given by this chapter to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin *dependent* upon such employee, but in such cases there shall be only one recovery for the same injury. Apr. 22, 1908, c. 149 Sec. 9, as added Apr. 5, 1910, c. 143, Sec. 2, 36 Stat. 291."

The Fifth Amendment to the Constitution of the United States reads as follows:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, *or property, without due process of law;* nor shall private property be taken for public use, without just compensation."

Due service and receipt of a copy of the within is hereby admitted this.....day of April, 1953.

KNAPP, BOYLE, BILBY & THOMPSON

By .....

Valley National Building
Tucson, Arizona

FILED
MAY 18 1953
HAROLD B. WILLEY

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 735

C. C. ROMINE, as Administrator of the Estate of GEORGE A. ROMINE, Deceased,
Petitioner,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
Respondent.

Respondent's Brief Opposing Petition for a Writ of Certiorari to the Supreme Court of the State of Arizona

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Desper v. Starved Rock Ferry Co., 342 U.S. 187, 72 S.Ct. 216, 96 L.ed. 205	6
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Illinois C.R. Co. v. Doherty's Adm. (Ky.), 155 S.W. 119	3
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Fifth Amendment of the Constitution of the United States.... 2

Fourteenth Amendment to the Constitution of the United States 4

Rules of the Supreme Court, Paragraph 5(a), Rule 38..... 1

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Respondent's Brief Opposing Petition for a Writ of Certiorari to the Supreme Court of the State of Arizona

The petition for review by *certiorari* of a decision of the Supreme Court of Arizona is outside the scope of Paragraph 5(a), Rule 38, Rules of the Supreme Court. The federal question asserted to be involved, was determined in 1917 in *Erie R. Co. v. Winfield,* 244 U.S. 170, 61 L.ed. 1057, 37 S.Ct. 556, Ann. Cas. 1918B 662, 14 NCCA 957 (1917), and *N. Y. Cent. R. Co. v. Winfield,* 244 U.S. 147, 61 L.ed. 1045, 37 S.Ct. 546, which have been followed in a long line of cases down through the years. The Supreme Court of Arizona in

the opinion here sought to be reviewed, *Southern Pacific Company v. Romine,* 251 Pac.(2d) 908, held that upon the undisputed facts decedent was "unquestionably" engaged in duties closely affecting interstate commerce at the time of his death, and followed and quoted the *Winfield* case. The *Winfield* case held in substance that the entire field of employer responsibility for injuries, both negligent and non-negligent, to employees of interstate carriers had been occupied by The Federal Employers' Liability Act, and state legislatures had no right to interfere, even in instances where the Act did not provide for compensation.

Petitioner's argument in support of his reasons relied on for the allowance of the writ is divided into two parts. He asks this court to overrule *N. Y. Cent. R. Co. v. Winfield,* and he contends that the 1939 amendment to the Federal Employers' Liability Act, Title 45 USCA Sec. 51, 53 Stat. 1404, under his fact situation, does not apply.

On the first point, petitioner contends that the *Winfield* case deprives petitioner of a property right without due process of law, contrary to the Fifth Amendment to the Constitution of the United States. This contention is hard to follow, and petitioner concedes that he has been unable to find any law to support it.

The Federal Employers' Liability Act created a right in "any employee of a carrier" engaged in commerce or closely affecting commerce to recover damages for injuries or death suffered as the result of the negligence of the carrier. In case of the death of the employee, the right, by the express terms of the Act, accrues to the personal representative for the benefit of the widow, or children, or parents, or, if none, for the *dependent* next of kin. Petitioner does not fall into

any of these classes and hence complains that his property has been taken without due process. Actually no right ever existed in petitioner under the circumstances. See *Lindgren v. U. S.*, 281 U.S. 38, 74 L.ed. 686, 50 S.Ct. 207; *New Orleans R. Co. v. Jones* (Miss.), 72 So. 681; *Jones v. Charleston Ry.* (S.C.), 82 S.E. 415; *Illinois C. R. Co. v. Doherty's Adm.* (Ky.), 155 S.W. 1119, and *Melzner v. No. Pac. Ry. Co.* (Mont.), 127 Pac. 1002.

The *Lindgren* case points out that the Federal Employers' Liability Act gives a personal representative of a deceased employee the right to recover damages for such death *solely as trustee for the designated survivors* but does not give the personal representative any right of action on behalf of the estate. In that case, the decedent did not leave any dependents or other eligible next-of-kin, and this court, holding that the Act was intended to be both "paramount and exclusive," as respects state statutes on the subject, held that the administrator could not recover. In the *Lindgren* case, the contention was not made that the administrator had been deprived of property without due process. There the contention was that the Federal Act was not exclusive. Respondent's research confirms petitioner's statement that no case law supports his position.

This court has, however, consistently held that no deprivation of due process results under the Fourteenth Amendment from state statutes which limit the right of recovery for personal injuries. See:

Martin v. Pittsburgh, L. E. R. Co., 203 U.S. 284, 51 L.ed. 185, 27 S.Ct. 100;

Northern Pacific R. Co. v. Meese, 239 U.S. 614, 60 L.ed. 467, 36 S.Ct. 158;

New York Central R. Co. v. White, 243 U.S. 188, 61 L.ed. 667, 37 S.Ct. 247;

Mountain Timber Co. v. Washington, 243 U.S. 219, 61 L.ed. 685, 37 S.Ct. 260.

The rationale of these cases is that no person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit; and that the fact that Workmen's Compensation laws or similar laws require an injured person to look to the provisions of such law for relief and exclude a right of action which such person might theretofore have had at common law or under other statutes, does not contravene the due process clause of the Fourteenth Amendment.

Recently, and subsequent to the decision of the Supreme Court of Arizona here sought to be reviewed, this court has again considered the *Winfield* case and, in *South Buffalo R. Co. v. Ahern*, decided on January 19, 1953, 344 U.S. 367, 97 L.ed. 279, explicitly approved it, holding:

> "* * * the Federal Employers' Liability Act, supplanting a patchwork of state legislation with a nation-wide uniform system of liberal remedial rules, displaces any state law trenching on the province of the Act. State legislatures, for example, may not intrude into the Federal Act's interstate commerce perimeter to destroy uniformity by arbitrarily presuming the renunciation of rights which the Act confers, or by compelling parties to elect between their Federal remedies and an alternative State compensation plan. *Erie R. Co. v. Winfield*, 244 U.S. 170, 61 L.ed. 1057, 37 S.Ct. 556, Ann. Cas. 1918B 662, 14 NCCA 957 (1917)."

In three previous similar cases, this court has seen fit to deny *certiorari*. See *Copley v. Industrial Accident Commission*, 120 Pac.(2d) 879 (Cal.), *certiorari* denied, 316 U.S. 678, 62 S.Ct. 1108, 86 L.ed. 1752; *Allbright v. Penn. R. Co.*, 37 A.(2d) 870 (Md.), *certiorari* denied, 323 U.S. 735, 89 L.ed. 589, 69 S.Ct. 72; *Wright v. New York Central R. Co.*, 33 N.Y.S. (2d) 53, New York affirmed 43 N.E.(2d) 97 without opinion, *certiorari* denied 317 U.S. 668, 63 S.Ct. 73, 87 L.ed. 537.

If petitioner's contention were correct that he is not governed by the Federal Employers' Liability Act because his decedent was killed without negligence on the part of his employer, and that he can therefore proceed under the state law, then the absurd result would be that petitioner is in a more advantageous position than the widow or dependents of an employee in the same situation because the widow and dependents are specifically named in the Act and do not have that contention available to them. Petitioner contends that Congress intended to omit personal representatives by not naming them in the class entitled to recovery under the Federal Employers' Liability Act.

On the second point, petitioner's argument is also obscure. He quotes the 1939 amendment to the Federal Employers' Liability Act, which is as follows:

> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way, directly or closely and substantially affect such commerce, as above set forth, shall, for the purposes of this Act, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act."

Without citation of authority in support, he says the last two clauses of this amendment are conjunctions and argues that the amendment means that the Act applies only when the employee is engaged in commerce and is entitled to the benefits of the Act.

We do not believe that counsel is serious in this contention, for it is obvious that the employee is within the Federal Employers' Liability Act if any part of his duties or the performance thereof in any way closely or substantially affects interstate commerce.

The use of the conjunction "and" does not create a contrast or a condition by the final clause of the above paragraph, but rather it concludes the paragraph by stating that the employees as designated by the body of the paragraph shall be considered as entitled to the benefits of this chapter.

It is noted that the amendment applies to "any employee," and it seems clear that the last clause of the amendment is simply additional and explanatory. This court in *Desper v. Starved Rock Ferry Co.*, 342 U.S. 187, 72 S.Ct. 216, 96 L.ed. 205, held that the amendment:

> "* * * merely redefines for the purposes of the Federal Employers' Liability Act the scope of the word 'employee' to include certain persons not theretofore covered, because they were not directly engaged in interstate or foreign commerce."

It is evident that the 1939 amendment *enlarged* the class, instead of narrowing it as contended by petitioner.

CONCLUSION

Respondent respectfully submits that the asserted Federal question here involved has been many times heretofore determined by this court and is fully settled; and since the Supreme Court of Arizona in the decision herein sought to be reviewed followed the settled line of decisions of this court, the petition for writ of *certiorari* should be denied.

Respectfully submitted,

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Due service and receipt of a copy of the within is hereby admitted this.....day of May, 1953.

.....

Attorney for Petitioner

28

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Petitioner's Reply Brief

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Petitioner's Reply Brief

Our purpose in filing this reply brief is to prevent any misunderstanding by the members of the Court of our position under Reason I of our petition (page 10), and under Reason III (page 11).

Respondent's counsel appear to consider our argument under Reasons I and II to be confined to the contention that the Federal Employers Liability Act, as interpreted by the Arizona Supreme Court, violates petitioner's rights under the Fifth Amendment whereas in fact our contention under I is that the Federal Act should not be construed to prevent recovery by the petitioner under the Arizona Liability Law.

We had thought Reason I clear to that point but we find Respondent's counsel saying on page 2 "On the first point, petitioner contends that the *Winfield* case deprives petitioner of a property right without due process of law, contrary to the Fifth Amendment to the Constitution of the United States."

We stoutly contend that the Federal Act properly construed does not render nugatory the Arizona Employers' Liability Law where the employee sustains an interstate accident *unrelated to employer negligence* and that the decision of this Court in the *Winfield* cases should be reviewed and put aside. It is our belief that the dissenting opinion in the *Winfield* case by Justice Brandeis (whose elevation to the bench had but lately occurred and whose powers in this and other branches of jurisprudence were then but dimly realized) was sound and that the course of events since that decision confirms his views.

When *Winfield* was decided, the field of employer liability was generally thought to extend but little beyond the area of tort liability. Society was awakening to the duty of industry to care for those accidentally injured in its employ but the movement was in its infancy. Now the situation is reversed. The area of tort liability in the "field" is insignificant as compared to that of accident liability. Surely implications of one day from legislation do not chain the courts to a dead past.

We add a few additional words. Respondent's counsel argue on page 5 that if our contentions are accepted "the absurd result would be that petitioner is in a more advantageous position than the widow or dependents of an employee * * *". We cannot follow this argument. Under the

ruling of the Arizona Supreme Court the decedent's widow and children, had he left any, would have met precisely the same fate as did the petitioner.

The decision in the recent case of *South Buffalo Railroad Company v. Ahern* found in Volume 97 L.Ed. Advance Sheet 6, cited by respondent, does no more than hold that the carrier by appearing before the State Board estopped itself from claiming that the Federal Act prevented recovery under the State Act. Respectfully we submit that statements in the opinion as to the sweep of the Federal Act and its effect on state legislation were obiter. The state award was there upheld.

We hope that members of the Court will pardon us for calling to their attention the last paragraph of the dissenting opinion by Justice Douglas in *South Buffalo*, supra, in which he endorses views we are here presenting. We trust some other members of the Court will accept his invitation and join him so that the writ may be granted and the entire question reviewed in its present day setting.

We respectfully submit that such a review would mean a reversal of the court below and the announcement of a doctrine fair to those thousands now remediless because of the outmoded doctrine expressed by the majority in the *Winfield* case. If the court now adopts the principles of the dissenting opinion of Justice Brandeis, the benevolent aims of the Federal Act, which are referred to in the *South Buffalo* case, will be effectively carried out.

In the last sentence of Respondent's brief, we are quoted as contending that the 1939 amendment narrowed the class. Our true contention is that the 1939 amendment "has enormously enlarged the class of employees entitled to the bene-

fits of the Federal Employers Liability Act" (page 19 of Petitioner's brief), but that, even as enlarged, under the wording of the 1939 amendment, it has no application in cases, such as the one at bar, where no benefits are provided under the Federal Act.

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